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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

~~No. 709~~ 14

HANDY AND HARMAN, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 5, 1931

CERTIORARI GRANTED MARCH 16, 1931

(35,631)

(35,631)

SUPREME COURT OF THE UNITED STATES

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vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19467

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Hugh S. Williamson, Esq., Paul Peyton, Esq.

For Commissioner: Eugene Meacham, Esq., Percy S. Crewe, Esq.

1926

Aug. 21. Petition received and filed.
" 21. Notification of receipt mailed taxpayer.
" 24. Copy of petition served on Solicitor.
Oct. 20. Answer filed by General Counsel.
" 29. Copy of answer served on taxpayer. General Calendar.

1928.

Aug. 23. Notice of hearing Oct. 15, 1928.
Sept. 4. Motion to continue hearing to some date subsequent to Jan. 1, 1929, filed by tapayer.
" 11. Motion granted to Spring term of 1929.

[fol. 2]

1929.

Jan. 29. Hearing set Feb. 21, 1929.
Feb. 4. Motion for a continuance to a date subsequent to April 20, 1929, filed by taxpayer.
" 6. Motion granted for hearing April 22, 1929.
Apr. 22. Hearing had before J. J. Marquette, Div. 1, on merits. Briefs due 6-17-29.
May 1. Transcript of hearing 4-22-29 filed.

1929.

June 12. Motion for extension to 6-27-29 to file brief filed by taxpayer 6-12 granted.
" 13. Motion for extension to 7-17-29 to file brief filed by G. C. See 19837.
" 15. Motion for extension to 7-17-29 granted.
" 27. Brief filed by taxpayer.
July 16. Brief filed by G. C.
Oct. 16. Findings of Fact and Opinion rendered. Mr. Marquette, Div. 1. Judgment will be entered for Commissioner.
" 18. Decision entered. J. J. Marquette, Div. 1.

1930.

Jan. 28. Motion for supplemental findings of fact filed by taxpayer 2/5 copy served.
Feb. 4. Hearing set Feb. 26-30 on motion for supplemental findings.
" 26. Hearing had before Mr. Marquette on petitioner's motion for supplemental findings of fact—Motion overruled.
" 27. Transcript of hearing 2-26-30 filed.
" 28. Order denying motion for supplemental findings entered.

[fol. 3]

Apr. 1. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.
" 1. Proof of service filed.
" 18. Præcipe filed by taxpayer.
" 18. Proof of service of præcipe filed.
" 18. Statement of evidence lodged.
" 18. Notice of lodgment of statement of evidence and of hearing on May 6, 1930, to approve said statement filed.
May 6. Objections to proposed statement of evidence filed by G. C.
" 6. Hearing had before Mr. Trammell, Div. 2, approval of statement of evidence—continued to May 14.
" 6. Order of continuance to May 14, 1930, on approval of statement of evidence entered.
" 14. Agreed statement of evidence approved and ordered filed.

1930.
May 14. Hearing had before Chas. M. Trammell—Div. 2—on approval of statement of evidence—statement approved.

Now, May 21, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 4] BEFORE U. S. BOARD OF TAX APPEALS

Docket No. 19837

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:

For Taxpayer: Hugh S. Williamson, Esq., Paul Peyton, Esq.

For Commissioner: Eugene Meacham, Esq., Percy S. Crewe, Esq.

1926.
Sept. 9. Petition received and filed. Taxpayer notified.
" 10. Copy of petition served on General Counsel.
Oct. 20. Answer filed by General Counsel.
" 29. Copy of answer served on taxpayer. General Calendar.
1928.
Aug. 23. Notice of hearing Oct. 15, 1928.
Sept. 4. Motion to continue hearing to some date subsequent to Jan. 1, 1929, filed by taxpayer. See 19467.
" 11. M[illegible] granted to Spring term 1929.

[fol. 5]

1929.

Jan. 29. Hearing set Feb. 21, 1929.
Feb. 4. Motion for a continuance to a date subsequent to April 20, 1929, filed by taxpayer. See 19,467.
" 6. Motion granted for hearing April 22, 1929.
Apr. 22. Hearing had before J. J. Marquette, Div. 1, on merits. Briefs due 6-17-29.
May 1. Transcript of hearing 4-22-29 filed.
June 13. Motion for extension to 7-17-29 to file brief filed by G. C. 6-15 granted.
" 12. Motion for extension to 6-27-29 to file brief filed by taxpayer 6-12 granted.
" 27. Brief filed by taxpayer. See 19,467.
July 16. Brief filed by G. C. See 19,467.
Oct. 16. Findings of fact and opinion rendered. Mr. Marquette, Div. 1. Judgment will be entered for Commissioner.
" 18. Decision entered, Mr. Marquette, Div. 1.
" 26. Motion to set aside order of redetermination and for settlement of final determination under rule 50 filed by taxpayer. 10-31-29 copy served on G. C.
" 30. Hearing set Nov. 19, 1929, on motion.
Nov. 19. Hearing had before Mr. Van Fossan on petitioner's motion to set aside order. Stipulation read into record, assigned to Mr. Marquette.
Dec. 10. Transcript of hearing 11-19-29 filed.
" 27. Order setting aside decision and redetermining deficiency entered.

[fol. 6]

1930.

Jan. 28. Motion for supplemental findings of fact filed by taxpayer 2-5-30 copy served.
Feb. 4. Hearing set Feb. 26, 1930.
" 26. Hearing had before Mr. Marquette, Div. 1, on petitioner's motion for supplemental findings. Motion overruled.
" 27. Transcript of hearing 2-26-30 filed.
Apr. 1. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by taxpayer.

1930.

May 1. Proof of service filed.
" 18. Præcipe filed by taxpayer.
" 18. Proof of service filed.
" 18. Statement of evidence lodged.
" 18. Notice of lodgment of statement and of hearing on May 6, 1930, to approve said statement filed.
May 6. Objection to proposed statement of evidence filed by G. C.
" 6. Hearing had before Mr. Trammell, Div. 2, approval of statement of evidence continued to May 14.
" 6. Order of continuance to May 14, 1930, entered.
" 14. Agreed statement of evidence approved and ordered filed.
" 14. Hearing had before Chas. M. Trammell, Div. 2, on approval of statement of evidence—Ordered, statement approved.

Now, May 21, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 7] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19467

[Title omitted]

PETITION—Filed Aug. 21, 1926

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:CR:D-60D:LBW dated June 23, 1926, and as a basis for its proceeding alleges as follows:

The petitioner now is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office at 57 William Street, New York City, New York State.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on June 23, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 for $76,763.03 and for the calen-
[fol. 8] dar year 1919 for $3,156.90.

The deficiency in tax of $4,714.95 for the year 1918 is set forth and explained in Bureau letter of February 26, 1924, which is referred to in the notice of deficiency (a copy of which is attached and marked Exhibit A). Said deficiency was assessed in March, 1924, and on March 26, 1924, a claim for the abatement thereof was filed. The principal question involved related to the affiliation of petitioner and Hamilton & De Loss, Inc. The said notice of deficiency sets forth that said claim has been given due consideration and that the Bureau has ruled that petitioner and Hamilton & De Loss, Inc., are not affiliated for tax purposes, thereby rejecting said claim for abatement of the 1918 deficiency.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) In that the Commissioner has ruled that petitioner and Hamilton and De Loss, Inc., are not affiliated for tax purposes for the years 1918 and 1919.

(b) In that the Commissioner exceeded his authority in reversing the ruling of a former Commissioner that petitioner and said Hamilton & De Loss, Inc., were affiliated during the taxable year 1918 within the purview of Section 240 of the Revenue Act of 1918.

[fol. 9] (c) In that the invested capital for the year 1919 is incorrectly computed because the determination thereof is effected by the aforesaid ruling with respect to the affiliation of petitioner and Hamilton & De Loss, Inc., during the taxable year 1918.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) A Ruling by the Commissioner in Treasury Department letter of April 10, 1920, holding that petitioner and Hamilton & De Loss, Inc., were affiliated during the year

1918 within the purview of Section 240 of the Revenue Act of 1918.

(b) Substantially all the stock of petitioner and said Hamilton & De Loss, Inc., is owned or controlled by the same interests.

(c) That although Hamilton & De Loss, Inc., was organized after August 1, 1914, to wit, December 26, 1916, it was organized for the purpose of taking over certain departmental operations of petitioner relating to the manufacturing of silver for silversmiths and was a successor to a then existing business within the intent and meaning of the following proviso of Section 240(a) of the Revenue Act of 1918:

"* * * Provided, that there shall be taken out of such consolidated net income and invested capital, the net in- [fol. 10] come and invested capital of any such affiliated corporation organized after August 1, 1914, and not successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. In such case the corporation so taken out shall be separately assessed on the basis of its own invested capital and net income and the remainder of such affiliated groups shall be assessed on the basis of the remaining consolidated invested capital and net income. * * *"

Wherefore the petitioner prays that this Board may hear the proceeding and hold that petitioner and Hamilton & De Loss, Inc., were affiliated for tax purposes during the year 1918 within the purview of Section 240 of the Revenue Act of 1918.

Cortlandt W. Handy, Vice-President of Petitioner, 57 William Street, New York City. Breed, Abbott & Morgan, Attorneys for Petitioner, 32 Liberty Street, New York City.

[fol. 11] *Duly sworn to by Cortlandt W. Handy. Jurat omitted in printing.*

[fol. 12] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D-60D. LBW

June 23, 1926.

Handy and Harman, 59 Cedar Street, New York, New York.

SIRS: An examination of your income and profits tax returns and of your books of accounts and records for 1918 and 1919, discloses a deficiency in tax for the year 1919 of $3,156.90, as shown in the accompanying statement and schedule.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

[fol. 13] Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:D-60D LBW.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement, Form A, Schedule 1.

[fol. 14] Statement of Returns Examined and Resulting Tax Liability

Returns Examined

Company	Year	Form
Handy and Harman, 59 Cedar Street, New York, New York	1918	1120
	1919	1120

Tax Liability

Company	Year	Additional
Handy and Harman	1918	None
	1919	$3,156.90

The adjustments producing the above additional tax are explained in Bureau letters of February 26, 1924, and October 15, 1924, and Schedule 1 attached hereto.

The following claims have been given due consideration:

1918

Abatement	$21,086.04
Abatement	4,714.95
Refund	64,105.14
Refund	80,000.00
Credit	64,105.14
Credit	30,000.00

Waivers which will expire December 31, 1926, are on file for the years 1918 and 1919.

The Bureau has ruled that your company and Hamilton and De Loss, Incorporated, are not affiliated for tax purposes; therefore, the tax paid on the consolidated return [fol. 15] has been allocated as shown in Schedule 1.

A copy of this letter is being furnished your attorneys, Messrs. Breed, Abbott & Morgan, New York, New York, in accordance with authority conferred by your company.

Schedule 1

Year Ended December 31, 1919

Handy and Harman

Allocation of Taxes

Total tax, Schedule 5, Bureau letter dated October 15, 1924		$260,904.91
Previously assessed:		
Account #408,073	$257,840.26	
Amount allocated to Hamilton and De Loss, Incorporated	92.25	
Amount allocated to Handy and Harman	$257,748.01	257,748.01
Additional tax		$3,156.90

Now, May 21, 1930, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 16] Before United States Board of Tax Appeals

Docket No. 19467

[Title omitted]

Answer—Filed Oct. 20, 1926

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits that a deficiency letter was mailed to the taxpayer on June 23, 1926.

3. Admits that the taxes in controversy are income and profits taxes for the years 1918 and 1919 and are in the amount of $79,919.93.

4. Denies that the Commissioner committed any error in holding that the petitioner was not affiliated with Hamilton & De Loss, Inc.

5. (a) For lack of sufficient information to form a belief, denies the allegations contained in paragraph 5 (a) of the petition.

[fol. 17] 5. (b) Denies that substantially all the stock of the petitioner and Hamilton & De Loss is owned or controlled by the same interests.

5. (c) Admits that Hamilton & De Loss was organized after Aug. 1, 1914; for lack of information denies the exact date of the organization of said company; denies that said company was a successor to a then existing business within the purview of Section 240 (a) of the Revenue Act of 1918.

6. Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue.

Of Counsel: J. H. Byrne, Special Attorney, Bureau of Internal Revenue.

JHB/mvb.

Now, May 21, 1930, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

PETITION—Filed Sept. 9, 1926

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT: CR:D-60D:LBW dated August 25th, 1926, and as a basis for its proceeding alleges as follows:

The petitioner now is and at all the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office at 57 William Street, New York City, New York State.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on August 25th, 1926.

3. The taxes in controversy are income and profits taxes for the calendar year 1918 and for $76,763.03.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

[fol. 19] (a) In that the Commissioner has ruled that petitioner and Hamilton and De Loss, Inc., are not affiliated for tax purposes for the year 1918.

(b) In that the Commissioner exceeded his authority in reversing the ruling of a former Commissioner that petitioner and said Hamilton & De Loss, Inc., were affiliated during the taxable year 1918 within the purview of Section 240 of the Revenue Act of 1918.

(c) That of the alleged deficiency in tax of $25,800.99 for the year 1918, $21,086.04 thereof was paid on or about May 5th, 1923, by the Treasury Department's application thereto of a refund of that amount for the year 1917.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) A ruling by the Commissioner in Treasury Department letter of April 10, 1920, holding that petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 within the purview of Section 240 of the Revenue Act of 1918.

(b) Substantially all the stock of petitioner and said Hamilton & De Loss, Inc., is owned or controlled by the same interests.

[fol. 20] (c) That although Hamilton & De Loss, Inc., was organized after August 1, 1914, to wit, December 26, 1916, it was organized for the purpose of taking over certain departmental operations of petitioner relating to the manufacturing of silver for silversmiths and was a successor to a then existing business within the intent and meaning of the following proviso of Section 240(a) of the Revenue Act of 1918:

"* * * Provided, that there shall be taken out of such consolidated net income and invested capital, the net income and invested capital of any such affiliated corporation organized after August 1, 1914, and not successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income, derived from a government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive. In such case the corporation so taken out shall be separately assessed on the basis of its own invested capital and net income and the remainder of such affiliated groups shall be assessed on the basis of the remaining consolidated invested capital and net income. * * *"

Wherefore the petitioner prays that this Board may hear the proceeding and hold that petitioner and Hamilton & De Loss, Inc., were affiliated for tax purposes during the [fol. 21] year 1918 within the purview of Section 240 of the Revenue Act of 1918.

Cortlandt W. Handy, Vice-President of Petitioner, 57 William Street, New York City. Breed, Abbott & Morgan, Attorneys for Petitioner, 32 Liberty Street, New York City.

Duly sworn to by Cortlandt W. Handy. Jurat omitted in printing.

[fol. 22] EXHIBIT A TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:CR:D-60D. LBW

August 25, 1926.

Handy and Harman, 59 Cedar Street, New York, New York.

SIRS: Your claims for abatement of deficiencies in tax amounting to $21,086.04 and $4,714.95, respectively, assessed against you for the taxable year 1918 have been carefully considered by this office, and it is proposed to reject these in full for the reason that an examination of your return shows a tax liability equal to the amount previously assessed as indicated by letter of the Bureau dated June 23, 1926.

In accordance with the provisions of Section 283(c) or 283(k) of the Revenue Act of 1926, you are allowed 60 days (not counting Sunday as the sixtieth day) from the date of mailing this letter within which to file a petition with the United States Board of Tax Appeals, Earle Building, Washington, D. C., contesting in whole or in part the correctness of this determination.

[fol. 23] If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals on the enclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CR:D-60D:LBW. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Enclosures: Statement, Form A.

Now, May 21, 1930, the foregoing Petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 24] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits that a deficiency letter was mailed to the taxpayer on August 25, 1926.

(3) Admits that the taxes in controversy are income and profits taxes for the calendar year 1918 and are in the amount of $76,763.03.

(4) Denies that the Commissioner committed the errors alleged in paragraph (4) of the petition.

(5) (a) For lack of sufficient information to form a belief denies the allegations contained in paragraph 5, subdivision (a) of the petition.

[fol. 25] (5) (b) Denies that substantially all the stock of the petitioner and Hamilton & De Loss, Inc., is owned or controlled by the same interests.

(5) (c) Admits that Hamilton & De Loss, Inc., was organized after August 1, 1914; for lack of information denies the exact date of the organization of said company; denies that said company was a successor to a then existing business within the purview of Section 240 (a) of the Revenue Act of 1918.

(6) Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue.

Of Counsel: J. H. Byrne, Special Attorney, Bureau of Internal Revenue.

JHB/mvb.

Now, May 21, 1930, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 26] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467 and 19837.

HANDY & HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION

Promulgated October 16, 1929

1. The Commissioner had authority to reconsider and reverse the determination of his predecessor in office, that the petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 and the period January 1, to February 1, 1919.

2. The petitioner and Hamilton & De Loss, Inc., were not affiliated during the year 1918 and the period January 1, to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

Hugh S. Williamson, Esq., for the Petitioner
Eugene Meacham, Esq., and C. E. Lowery, Esq., for the Respondent.

[fol. 27] These proceedings, which were duly consolidated for hearing and decision, are for the redetermination of deficiencies in income and profits taxes, asserted by the respondent in the amounts of $25,800.99 for the year 1918, and $3,156.90 for the year 1919. The only issue is whether the petitioner and Hamilton & De Loss, Inc., were affiliated

during the year 1918 and the period January 1, to February 1, 1919, and entitled to file consolidated returns of income and invested capital.

Findings of Fact

The petitioner is a corporation organized under the laws of New York in the year 1905, with its principal office at New York City. Its factory is located at Bridgeport, Connecticut. The petitioner, upon its organization, took over the business of the partnership of Handy & Harman, which for many years had been engaged in dealing in gold and silver bullion and specie, but its charter authorized it also to buy, sell and manufacture other metals.

Prior to the year 1906, the petitioner and the partnership of Handy & Harman had been supplying the silversmith trade with silver rolled into sheets and coils at their Bridgeport plant. About that time, however, the petitioner began the practice of cutting the silver into flat circles and rectangles so as to minimize the amount of scrap silver which would have to be returned by the silversmiths, thus saving in investment and in transportation and packing costs, and [fol. 28] enabling the corporation to operate on a lesser amount of raw materials than theretofore carried.

About 1912 or 1913, the officers of the petitioner conceived the idea of not only stamping out the flat circles and rectangles, but of partially shaping them, thus saving the silversmiths part of the hand labor required to shape the blanks on lathes, besides further reducing the amount of scrap. This, however, would have required the installation by the petitioner of large double-action presses which in one operation would cut out the flat pieces and stamp them into the preliminary shapes. For a year or two the petitioner's officers discussed whether this additional work should be undertaken and if so, whether it should be handled by the petitioner or by a separate corporation formed for that purpose. A strong reason for the adoption of the latter course was that because of the limited amount of silver business available it would be necessary, in order to keep the new equipment busy and justify the expense of installing it, to use it on the base metals as well as on silver, and the petitioner's officers desired to limit its operation to

the precious metals. Harry H. DeLoss, vice-president of the petitioner, discussed the matter at great length with Harold H. Hamilton, a man of many years experience in the silversmithing business, and it was finally decided to organize a new corporation with Hamilton at its head.

Accordingly, on December 23, 1916, the new corporation, Hamilton & DeLoss, Inc., was organized under the laws of Connecticut, with Hamilton as president and DeLoss as [fol. 29] vice-president. It was the intention at the time Hamilton & DeLoss, Inc., was organized, that the petitioner should continue to mill and roll silver, but that Hamilton & DeLoss, Inc., should take over the stamping operation and should extend the operation to the point of giving preliminary shape to the pieces, and in addition should operate in other metals. The petitioner continued to manufacture flat circles and rectangles after the organization of Hamilton & DeLoss, Inc., but it was the intention of the officers of both corporations that Hamilton & DeLoss, Inc., should take over all of that part of the business.

The capital stock of the petitioner and of Hamilton & DeLoss, Inc., were $650,000 and $300,000, respectively, divided into shares of $100 each, and at the beginning and the end of the year 1918 they were held as follows:

	January 1, 1918		December 31, 1918	
	Handy & Harman	Hamilton & De Loss, Inc.	Handy & Harman	Hamilton & De Loss, Inc.
Parker W. Handy.....	28.25%	21.28%	28.25%	16.67%
John L. Harman.....	18.40%	10.64%	18.40%	8.33%
Harry H. De Loss.....	28.23%	22.13%	28.23%	33.34%
William B. Sewell.....	15.75%	14.89%	15.75%	11.66%
George C. Gerrish.....	1.54%	3.40%	1.54%	3.33%
Robert H. Leach.....	1.54%	3.40%	1.54%	3.33%
Minority—scattered ...	6.29%	.....	6.29%	.....
H. H. Hamilton.....	.....	20.43%	.....	20.00%
John M. Blackburn....	.....	2.13%	.....	1.67%
Alfred C. Fones.....	.....	1.70%	.....	1.67%
	100.	100.	100.	100.

[fol. 30] The minority interest in the petitioner, consisting of 409 shares, was held in small lots by sixteen employees, and 300 of these shares, or 4.61%, were held under an agreement, a notation of which appeared on the certificate, that if the holder should leave the employ of the petitioner, the petitioner would have the right to buy back the stock at par.

When Hamilton & De Loss, Inc., was organized, Hamilton had no money to purchase stock therein. The purchase price of the 20% interest standing in his name was financed by promissory notes endorsed by Harry H. De Loss, and although the stock was issued to Hamilton he assigned it to De Loss, who deposited it as collateral security for the notes. Hamilton never paid anything on the notes. In 1919, he became insolvent and on February 1, 1919, De Loss paid the notes and took over the stock. During the period of his ownership of the stock Hamilton attended all meetings of the stockholders of Hamilton & De Loss, Inc., and voted his stock, but never voted in opposition to Messrs. Handy, Harman, Sewell and De Loss. John M. Blackburn and Alfred C. Fones took no active part in the business of Hamilton & De Loss, Inc. They were close friends of De Loss and their stock was voted for them by proxies given to De Loss.

Hamilton received a salary of about $10,000 a year from Hamilton & De Loss, Inc., but the other officers and directors, who were also officers, directors or employees of the petitioner, received no compensation from Hamilton & De Loss, Inc., but were paid entirely by the petitioner. De [fol. 31] Loss, who was vice-president of both corporations, devoted about one-third of his time to Hamilton & De Loss, Inc., and Robert H. Leach, who was technical advisor and administrative assistant of the petitioner, devoted his entire time to Hamilton & De Loss, Inc., but received his entire salary from the petitioner. George C. Gerrish was manager of the petitioner's Bridgeport plant and secretary of Hamilton & De Loss, Inc.

The plant of Hamilton & De Loss, Inc., was erected in Bridgeport, Connecticut, about one hundred or one hundred and fifty yards distant from the petitioner's plant, and silver production machinery costing $47,000 was installed. However, on account of war conditions work was so slow that at the end of January, 1918, the output of the plant has been small, the total sales thereof amounting only to $6,-295.35.

At the beginning of the year 1918, the petitioner and Hamilton & De Loss, Inc., were facing a difficult situation. The silver business had declined greatly. The officers were apprehensive that both corporations, they being in the class of non-essential industries, would be commandeered by the Government and disorganized. They were also encount-ing

difficulty in obtaining labor and raw material. After numerous discussions, both at board meetings and among the individuals who controlled the two corporations, it was decided that Hamilton & De Loss, Inc., should not for the present proceed with the silver stamping business for which it had been organized and equipped. It therefore became necessary, in order to continue the operation of the plant, [fol. 32] to secure work from the Government, and the corporation then went into production as sub-contractors on Government work. The petitioner also secured some sub-contracts, which were of benefit in placing it among the essential industries of the country.

In August, 1918, an officer connected with the gas mask division of the United States Army called on Harry H. De Loss at the petitioner's Bridgeport plant to ascertain whether that plant could mill brass for making eye pieces for gas masks. On being informed that it could, he inquired whether the plant could also stamp out the eye pieces. De Loss informed him that the work could not be done by the petitioner's plant alone, but that the petitioner also controlled the plant of Hamilton & De Loss, Inc., and that the work could be done in the two plants. After discussion among the officers and directors of the two corporations, and after several visits had been made to Washington by De Loss, with reference to the matter, it was decided to take the contract for the manufacture of eye pieces in the name of Hamilton & De Loss, Inc., principally because the billing work could be more conveniently handled through the offices of that company than through the New York office of the petitioner. However, the petitioner financed the contract, melted the metal, Hamilton & De Loss not being equipped for that work, rolled the metal and furnished it to Hamilton & De Loss, Inc., which stamped out the eye pieces, and returned the scrap metal to the petitioner for remelting. The entire contract was performed in that manner.

[fol. 33] The contract called for 1,000,000 eye pieces at 7½ cents each, and it necessitated the installation by Hamilton & De Loss, Inc., of machinery and equipment costing $32,000. The machinery that had been installed for silver production was not adapted to use on the eye piece contract, and it stood idle while that contract was being performed.

Neither the petitioner nor Hamilton & De Loss, Inc., made any profit from the eye piece contract. Hamilton & De Loss, Inc., sustained a net loss in the year 1918 and during January, 1919.

The petitioner and Hamilton & De Loss, Inc., originally filed separate returns for the year 1918, but subsequently filed a consolidated return for that year, and on April 10, 1920, the then Commissioner of Internal Revenue accepted the consolidated return and ruled that the two companies were affiliated during the year 1918 within the meaning of section 240 of the Revenue Act of 1918. On January 19, 1924, Commissioner Blair reversed the ruling made by his predecessor in office and held that the two companies were not affiliated, and he subsequently asserted deficiencies in tax against the petitioner in the amounts of $25,800.99 for the year 1918, and $3,156.90 for the year 1919.

Opinion

MARQUETTE: The first issue raised by the pleadings herein is whether Commissioner Blair had authority to reverse and set aside the finding of his predecessor in office that the petitioner and Hamilton & De Loss, Inc., were [fol. 34] affiliated during the year 1918 and the period January 1, to February 1, 1919, and entitled to file consolidated returns of net income and invested capital. This issue must be resolved in favor of the respondent on the authority of Yokohama Ki-Ito Kwaisha, Ltd., 5 B. T. A. 1248; Estate of W. S. Tyler, 9 B. T. A. 255; James Couzens, 11 B. T. A. 1040; Rosetta v. Hauss, 12 B. T. A. 755; Estate of John F. Dodge, 13 B. T. A. 201, and Anna T. Dodge, et al., Executors, 13 B. T. A. 223.

Our decision on the first issue makes it necessary for us to determine whether the petitioner and Hamilton & De Loss, Inc., were affiliated during the year 1918 and the period January 1, to February 1, 1919, and entitled to have their tax liability computed on the basis of consolidated returns, within the meanings and under the authority of section 240 of the Revenue Act of 1918.

The petitioner claims affiliation and the right to file consolidated returns, while the position of the respondent is, (1st) that affilation did not exist because the necessary conditions relative to ownership or control of the capital stock

of the two corporations were not present; (2nd) that even if the two corporations were affiliated their tax liabilities should not be computed on the basis of consolidated returns, for the reason that Hamilton & DeLoss, Inc., was a "corporation organized after August 1, 1914, and not a successor to a then existing business, 50 per centum or more of whose gross income consists of gains, profits, commissions, or other income derived from a Government contract or contracts made between April 6, 1917, and November 11, 1918, * * *." There is no claim made, nor does the [fol. 35] record disclose, that either one of the two corporations owned or controlled directly or indirectly, any of the capital stock of the other. If affiliation existed, it was because substantially all of the capital stock of both corporations was owned or controlled by the same interests.

The evidence herein establishes that six men, Handy, Harman, DeLoss, Sewell, Gerrish and Leach, owned outright 93.71% of the capital stock of the petitioner and 76.66% of the capital stock of Hamilton & DeLoss, Inc., and it may be assumed for the purpose of this opinion that they controlled 4.61% of the capital stock of the petitioner which was held by employees of the petitioner under an agreement that if they should leave the petitioner's employ the petitioner would have the right to purchase the stock. But did they control the 20% interest in Hamilton & DeLoss, Inc., owned by Hamilton? The evidence shows that when Hamilton & DeLoss, Inc., was organized Hamilton did not have sufficient money to purchase stock in the corporation. He secured the money from a bank pursuant to arrangements made by DeLoss and DeLoss endorsed his notes. Hamilton assigned his stock to DeLoss, who placed it with the bank as collateral security. On or subsequent to February 1, 1919, DeLoss paid the notes and took over the stock. The evidence also shows that as long as Hamilton owned the stock he attended the stockholders' meetings and voted the stock. It appears that he did not vote in opposition to Handy, Harman, DeLoss and Sewell, but there is no evidence that he could not have done so if he had de- [fol. 36] sired. So far as we know he voted with them of his own volition and not because they had any control over his stock. Handy, Harman, DeLoss and Sewell undoubtedly controlled Hamilton & DeLoss, Inc., and Hamilton apparently was a satisfied and tractable minority, who was

content that the Handy & Harman organization should control and operate Hamilton & DeLoss, Inc. This control, however, is not the control contemplated by the statute, and, where there is a substantial minority, unless there is a control of the stock of such minority, there is no affiliation of the corporation. Ice Service Co., Inc. v. Commissioner, 30 Fed. (2nd) 230; Commissioner v. Adolph Hirsch & Co., Inc., 30 Fed. (2d) 645, and Conley Tin Foil Corporation, 17 B. T. A. 65. In Ice Service Company, supra, it was stated:

Congress has declared that two corporations shall be treated as one for tax purposes when one corporation owns or controls substantially all the stock of the other or when substantially all the stock is owned or controlled by the same interests. Judicial interpretation may perhaps limit the statutory language to voting stock, as was held In Re Temtor Corn Etc. Products Co., 299 Fed. 326 [U. S. Tax Cases, 2nd Supp. 1325] aff'd sub. mom. Schafly v. United States, 4 Fed. (2d) 195 (C. C. A. 8), but we are not to confuse control of the corporation with control of the stock. The test is not declared to be control of the business or the policies of the subsidiary corporation but substantial [fol. 37] identity of interest in the enterprise. The theory of affiliation, resulting in a consolidated return for taxes is that the income and invested capital are really the income and capital of a single enterprise though carried on through the instrumentality of several corporations. See Art. 631, Treasury Regulations, 1920 Edition; Holmes, Fed. Taxes 6th Ed. 281; Alameda Inv. Co. v. McLaughlin, 28 Fed. (2d) 81 (N. D. Cal.). Only when the outside interest, that is, the interest of the minority, is so small as to be practically negligible, are the two corporations to be treated as in receipt of a single income requiring a consolidated return.

Again, in Adolph Hirsch & Co., supra, the same court said:

The management of the business of the corporation is not the control required by the statute. It refers to stock control. The fact that the minority is acquiescent and permits the majority to manage the business does not prove actual control over the minority interest. Nor does a control based upon friendship or professional relations satisfy

the statute. The control of the stock owned by the same interest refers to beneficial interest. This meaning is consistent with the purpose of the statute to extend to those subject to the hazard of the enterprise, when they are sub-
[fol. 38] stantially one and the same, the benefit of the consolidated reports.

We are of opinion that the same interest that owned or controlled the capital stock of the petitioner, did not own or control substantially all of the capital stock of Hamilton & De Loss, Inc. Therefore, the quantum of ownership or control required by the statute for affiliation of the two corporations does not exist in this case and we must affirm the action of the respondent in refusing to determine the tax liability of the petitioner and Hamilton & De Loss, Inc., on the basis of consolidated returns.

Judgment will be entered for the respondent.

Now, May 21, 1930, the foregoing Findings of Fact and Opinion, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 39] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19467

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated October 16, 1929, it is

Ordered and decided: That there is a deficiency of $3,156.90 for the year 1919.

Enter.

John J. Marquette, Member United States Board of Tax Appeals.

Entered Oct. 18, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 40] BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 19837

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated October 16, 1929, it is

Ordered and decided: That there is a deficiency of $25,800.99 for the year 1918.

Enter.

John J. Marquette, Member United States Board of Tax Appeals.

Entered Oct. 18, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Decision certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 41] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

MOTION TO SET ASIDE ORDER AND FOR SETTLEMENT UNDER RULE 50—Filed Oct. 26, 1929

Comes now the above petitioner by its attorney, Hugh S. Williamson, and moves that the order of redetermination

in this cause, entered October 18, 1929, in which it was ordered and decided that there is a deficiency of $25,800.99 for the year 1918, be set aside and that the final order of the Board be entered pursuant to Rule 50 of the Board's Rules of Practice and for reason therefor states:

That the petition in this cause was based upon letter of the Commissioner of Internal Revenue dated August 25, 1926, rejecting claims for abatement for the year 1918 in the amounts of $21,086.04 and $4,714.95, respectively; that the total tax liability for the year 1918 as determined by the Commissioner of Internal Revenue and approved by [fol. 42] this Board is $222,278.76 and that such amount has been assessed; that of the aforesaid tax liability of $222,278.76 there has been paid the amount of $217,563.81, leaving an unpaid balance of $4,714.95.

Wherefore it is prayed that the order of redetermination of October 18, 1929, be set aside and that settlement of final determination be had under Rule 50 of the Board's Rules of Practice.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York, N. Y.

Now, May 21, 1930, the foregoing Motion to Set Aside Order and for Settlement Under Rule #50, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 43] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19837

[Title omitted]

ORDER SETTING ASIDE DECISION AND REDETERMINING DEFICIENCY

Whereas, on October 18, 1929, the Board entered its decision in the above entitled proceeding finding a deficiency for the year 1918 in the amount of $25,800.99, and

Whereas, the petitioner filed a motion to set aside such final decision and for settlement of final determination

under Rule 50, and the respective parties, by their counsel, having stipulated in open hearing that there is no deficiency for the year 1918,

Now, therefore, upon consideration thereof, it is

Ordered, that the said decision entered herein on October 18, 1929, be and the same hereby is set aside and revoked, and it is

[fol. 44] Further ordered and decided, upon redetermination, in pursuance with the stipulation of the respective parties, that there is no deficiency for the year 1918.

(Signed) John J. Marquette, Member United States Board of Tax Appeals.

Entered Dec. 27, 1929.

A true copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

Now, May 21, 1930, the foregoing Order Setting Aside Decision and Redetermining Deficiency, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 45] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

MOTION FOR SUPPLEMENTAL FINDINGS OF FACT—Filed Jan. 28, 1930

Comes now the above named petitioner by its attorney, Hugh S. Williamson, and moves that the Board make certain additional findings of fact in this proceeding as hereinafter set out, and in support of such motion shows:

That this proceeding came on for hearing before the Board on April 22, 1929. That thereafter on October 16, 1929, the Board promulgated its findings of fact and opinion and on October 18, 1929, entered its decision in Docket No. 19,837, determining a deficiency of $25,800.99 for the year 1918, and also entered its decision in Docket No. 19,467, determining a deficiency of $3,156.90 for the year 1919.

That thereafter, upon petitioner's motion, the Board set aside and vacated its said decision of October 18, 1929, in Docket No. 19,837 and on December 19, 1929, entered its decision determining no deficiency for the year 1918.

[fol. 46] That at the hearing of this proceeding, as aforesaid, petitioner introduced evidence to show that the then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, and entitled to file consolidated returns of income and invested capital. That the respondent introduced no evidence tending to show that Commissioner Blair had any other or additional facts before him when he reversed said ruling of his predecessor in office; that the Board in its said findings of fact and opinion makes no finding as to whether or not Commissioner Blair had the same facts before him when he reversed said ruling of his predecessor in office and that petitioner deems such a finding material to the determination of whether or not Commissioner Blair had authority to so reverse said ruling of his predecessor in office.

The petitioner further shows that at the hearing of this proceeding before the Board, as aforesaid, certain documents were received in evidence and marked as Petitioner's Exhibits 8 and 9; that in its findings of fact as aforesaid the Board does not set out the contents of said exhibits and that petitioner deems the contents of said exhibits material to the determination of the question of affiliation presented in this proceeding.

Wherefore petitioner prays that the Board grant this motion and make supplemental findings of fact as follows:

[fol. 47] (1) The then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(2) When Commissioner Blair reversed said ruling of his predecessor in office he had before him the same facts as were before his said predecessor.

(3) When Commissioner Blair reversed said ruling of his predecessor in office he had before him no facts in addition to or other than those before his said predecessor.

(4) A finding setting out in full the contents of Petitioner's Exhibits 8 and 9.

In the alternative and in the event that the Board refuses to make any one of the findings as requested in (1), (2) or (3) above, petitioner prays that the Board then make supplemental findings of fact as set out in (5), (6) or (7), respectively, as follows:

(5) The then Commissioner of Internal Revenue did not have all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & De Loss, Inc., were affiliated for the calendar year 1918 and the period [fol. 48] January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(6) When Commissioner Blair reversed said ruling of his predecessor in office he did not have before him the same facts as were before his said predecessor.

(7) When Commissioner Blair reversed said ruling of his predecessor in office he had before him facts in addition to or other than those before his said predecessor.

Respectfully submitted.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City. Breed, Abbott & Morgan, 15 Broad Street, New York City.

Now, May 21, 1930, the foregoing Motion for Supplemental Findings of Fact certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 49] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 19467

[Title omitted]

ORDER DENYING MOTION FOR SUPPLEMENTAL FINDINGS

A true copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.

This proceeding came on for hearing February 26, 1930, on motion of the petitioner for supplemental findings of fact, Paul Peyton, Esq., appearing for the petitioner and H. Meacham, Esq., appearing for the respondent. After hearing the arguments of counsel and upon examination of the record herein the Board is unable to make the supplemental findings of fact requested in the petitioner's motion numbered 1, 2, 3, 5 and 7. As to motion set forth in request number 4, it appears that the exhibits mentioned therein are available to the petitioner as a part of the record on any review of this proceeding and it is therefore
[fol. 50] Ordered that the said motion for supplemental findings of fact be and the same hereby is denied.

Entered.

Entered Feb. 28, 1930.

(Signed) John J. Marquette, Member United States Board of Tax Appeals.

Now, May 21, 1930, the foregoing Order Denying Motion for Supplemental Findings, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 51] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed April 3, 1930

Notice to the Above-named Respondent and to C. M. Charest, General Counsel, Bureau of Internal Revenue, His Attorney

Please take notice, that on the 1st day of April, 1930, the petitioner, by its attorney, did present to and file

with the Clerk of the United States Board of Tax Appeals, its petition, copy of which is hereto annexed, for the review by the United States Circuit Court of Appeals for the Second Circuit, of the decisions of the said Board, on October 18, 1929, and December 27, 1929.

(Signed) H. S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City.

[fol. 52] Service of copy of the above notice and copy of the attached petition for review is hereby accepted this 1st day of April, 1930.

(Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Board of Tax Appeals Docket Nos. 19467, 19837

HANDY & HARMAN, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW—Filed April 1, 1930

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the petitioner, Handy & Harman, and respectfully shows:

[fol. 53]. First. Petitioner is a corporation organized under the laws of the State of New York with its main office and principal place of business in the City of New York, County and State of New York.

Second. This petition is made for a review of a decision of the United States Board of Tax Appeals in Docket No. 19,837 entered December 27, 1929, approving the action of the Commissioner of Internal Revenue in rejecting petitioner's claims for abatement of income and profits taxes for the calendar year 1918 in the amount of $25,800.99 and the decision of the United States Board of Tax Appeals

entered October 18, 1929, in Docket No. 19,467, wherein said Board approved a deficiency of $3,156.90 for the calendar year 1919. Said decisions were entered in pursuance of certain findings of fact and opinion of said Board promulgated October 16, 1929. These cases were duly consolidated for hearing and decision before the United States Board of Tax Appeals.

Third. The income and profits tax returns of petitioner for the said periods were filed with the Collector of Internal Revenue for the Second District of New York, whose office is located within the district over which the Court of Appeals for this circuit has jurisdicton.

Fourth. The petitioner and Hamilton & De Loss, Inc., originally filed separate returns for the year 1918 but subsequently filed a consolidated return for that year and on [fol. 54] April 10, 1920, the then Commissioner of Internal Revenue accepted the consolidated return and ruled that the two companies were affiliated during the year 1918 within the meaning of Section 240 of the Revenue Act of 1918. On January 19, 1924, Commissioner Blair reversed said ruling of his predecessor and held that the two companies were not affiliated, and he subsequently rejected petitioner's claims for abatement for 1918 aggregating $25,800.99 and asserted a deficiency for 1919 in the amount of $3,156.90. Upon appeal to the United States Board of Tax Appeals, the Board held that Commissioner Blair had authority to reverse the determination of his predecessor in office; that petitioner and Hamilton & DeLoss, Inc., were not affiliated during the year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918, and thereupon entered its decisions as aforesaid approving the determination of the Commissioner. Thereafter petitioner filed a motion for supplemental findings of fact which was denied by the Board in its order entered February 28, 1930.

Fifth. The issues presented here are, first, whether Commissioner Blair had authority to reverse the determination of his predecessor in office; and, second, if this Court finds that Commissioner Blair had such authority, whether petitioner and Hamilton & DeLoss, Inc., were affiliated within the meaning of Section 240 of the Revenue Act of 1918 during the period January 1, 1918, to February 1, 1919, and

[fol. 55] entitled to file consolidated returns of net income and invested capital.

Sixth. The errors committed by the United States Board of Tax Appeals upon which the petitioner relies as the basis of this proceeding are as follows:

(1) The Board erred in refusing to find that the facts concerning which the witness, DeLoss, testified were presented to the then Commissioner of Internal Revenue prior to April 10, 1920.

(2) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that the then Commissioner of Internal Revenue had all the material facts before him on April 10, 1920, when he ruled that petitioner and Hamilton & DeLoss, Inc., were affiliated for the calendar year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918.

(3) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that when Commissioner Blair reversed said ruling of his predecessor in office he had before him the same facts as were before his said predecessor.

(4) The Board erred in refusing to find as requested in petitioner's motion for supplemental findings that when [fol. 56] Commissioner Blair reversed said ruling of his predecessor in office he had before him no facts in addition to or other than those before his said predecessor.

(5) The Board erred in holding that Commissioner Blair had authority to reverse and set aside the finding of his predecessor in office that the petitioner and Hamilton & DeLoss, Inc., were affiliated during the year 1918 and the period January 1 to February 1, 1919, and entitled to file consolidated returns of net income and invested capital.

(6) The Board erred in holding that substantially all of the stock of petitioner and Hamilton & DeLoss, Inc., was not owned or controlled by the same interests.

(7) The Board erred in failing to find and hold that substantially all of the stock of petitioner and Hamilton

& DeLoss, Inc., was owned or controlled by the same interests.

(8) The Board ered in failing to hold that Hamilton & DeLoss, Inc., was a successor to a business existing at the time of its organization within the meaning of Section 240 of the Revenue Act of 1918.

(9) The Board erred in holding that petitioner and Hamilton & DeLoss, Inc., were not affiliated for the year 1918 and the period January 1 to February 1, 1919, within the meaning of Section 240 of the Revenue Act of 1918, and [fol. 57] entitled to file consolidated returns of net income and invested capital.

(10) The Board erred in failing to find and hold that petitioner and Hamilton & DeLoss, Inc., were affiliated within the meaning of Section 240 of the Revenue Act of 1918 and entitled to file consolidated returns of net income and invested capital for the year 1918 and the period January 1, 1918, to February 1, 1919.

Wherefore your petitioner prays that this Court may take such steps as may be necessary to review the action of the United States Board of Tax Appeals in this cause, reverse its decision and direct the Board to enter a decision redetermining the income and profits taxes of petitioner for the years 1918 and 1919 upon the basis of affiliation with Hamilton & DeLoss, Inc., and for such other and further relief as may to this Court appear proper in the premises.

Hugh S. Williamson, Attorney for Petitioner, 15 Broad Street, New York City. Breed, Abbott & Morgan, 15 Broad Street, New York City.

[fol. 58] *Duly sworn to by Hugh S. Williamson. Jurat omitted in printing.*

Now, May 21, 1930, the foregoing Petition for Review, Notice of Filing and Proof of Service, certified from the record as true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 59] BEFORE THE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

HANDY & HARMAN, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

Statement of Evidence—Filed May 14, 1930

The above case came on for hearing before the Honorable John J. Marquette, a member of the United States Board of Tax Appeals, on the 22nd day of April, 1929, pursuant to notice of hearing theretofore given, petitioner being represented by its counsel, Hugh S. Williamson, and the respondent by his counsel, Eugene Meacham and C. E. Lowery. Prior to the introduction of testimony, the member of the Board made the following announcement:

"Without objection let the record show that these proceedings in dockets 19,467 and 19,837 are consolidated for hearing and decision."

The petitioner to maintain the issues on its behalf introduced the oral testimony of Cortlandt W. Handy, George C. Gerrish, Harry H. DeLoss and Robert H. Leach, and various documents marked Petitioner's Exhibits 1 to 11, [fol. 60] inclusive, which were duly admitted in evidence. In its findings of fact the Board of Tax Appeals has set forth the substance of the oral testimony and a portion of the documentary evidence, which findings of fact are hereby adopted and incorporated herein by reference as a partial statement of the evidence.

Subsequent to the promulgation by the Board of its findings of fact and decision, the petitioner filed a motion for supplemental findings of fact based upon the testimony of Harry H. DeLoss, which motion was denied by the Board. In the petition for review of the Board's decision, error has been assigned by reason of the denial of said motion.

The findings of fact as made by the Board of Tax Appeals include the substance of the testimony of Harry H. DeLoss but do not show what particular findings therein are based upon the testimony of said Harry H. DeLoss. The Board has also failed to set out in its said findings the contents of Petitioner's Exhibits 9 and 10, which were duly

identified by said DeLoss and thereupon offered and received in evidence.

Said HARRY H. DELOSS, being called as a witness on behalf of petitioner, after having been duly sworn, testified as follows:

That he had been connected with Handy & Harman since its organization in 1905, having been one of the organizers and a director of the corporation; that prior to the forma- [fol. 61] tion of the corporation he had been associated with the partnership of Handy & Harman since 1900 or 1901 and that prior to 1906 the petitioner and the partnership of Handy & Harman were not doing any stamping work but had been supplying the silversmith trade with silver rolled into sheets at their Bridgeport plant. That about 1905 or 1906, the petitioner began the practice of cutting the silver into flat circles and rectangles; that about 1912 or 1913, the idea was conceived of not only stamping out the flat circles and rectangles, but of partially shaping them; that it was realized that additional machinery and equipment would be needed for this work and that an additional working organization with an experienced man at the head of it would be necessary. That for a year or two petitioner's officers discussed whether this additional work should be undertaken and, if so, whether it should be handled by petitioner or by a separate corporation formed for that purpose. That it was finally decided to organize a separate corporation for the reason that, due to the limited amount of silver business available, it would be necessary, in order to keep the new equipment in operation and to justify the expense of installing it, to use it on the base metals as well as on silver, and the petitioner's officers desired to limit its operation to the precious metals. That he also discussed this matter at length with Harold H. Hamilton, a man of many years experience in the silversmithing business, and that when it was decided to organize a separate corporation it was also decided to make Hamilton head of that corporation. That on December 23, [fol. 62] 1916, the new corporation, Hamilton & DeLoss, Inc., was incorporated under the laws of Connecticut, with Hamilton as president and DeLoss as vice president. That Hamilton at that time was in debt and had no money with which to purchase stock in the new corporation and that he

(DeLoss) arranged with the Connecticut National Bank for Hamilton to borrow money on his note to pay for the 20% of the stock issued to him; that he endorsed the notes given by Hamilton and the stock which was issued to Hamilton was immediately assigned to him and deposited with the bank as collateral security for the payment of the notes. That Hamilton never paid anything on the notes and that later he (DeLoss) paid all the notes with interest and took over the stock.

At this point the witness identified two documents which were offered and received in evidence as Petitioner's Exhibits 9 and 10. Exhibit 9 is in the following words and figures:

EXHIBIT 9

"Irrevocable Stock Power

Know all men by these presents that Robert W. Higgins, for value received, has bargained, sold, assigned and transferred, and by these presents do- bargain, sell, assign, and transfer unto H. H. DeLoss, six hundred shares of capital stock of Hamilton & DeLoss, Inc., standing in my name on the books of the —— and — do hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for [fol. 63] —— and in — name and stead, but to — use, to sell, assign, transfer and make over, all or any of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that — said Attorney, or — substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 9th day of January, 1918.

(Signed) Frank Craig. (Signed) Robert W. Higgins. (L. S.)

Sealed and delivered in the presence of ——.

(Back of Page 1)

STATE OF ——,
—— of ——,
County of ——, ss:

On the — day of ——, in the year one thousand nine hundred and ——, before me personally came —— ——, to

me known to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same."

[fol. 64] Exhibit 10 is in the following words and figures:

EXHIBIT 10

"Irrevocable Stock Power

Know all men by these presents that H. H. Hamilton, for value received, has bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign, and transfer unto Robert W. Higgins, six hundred shares of capital stock of Hamilton & De Loss, Inc., standing in my name on the books of the —— and — do hereby constitute and appoint —— —— true and lawful attorney, irrevocable, for —— and in — name and stead, but to — use, to sell, assign, transfer and make over, all or any of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that — said Attorney, or — substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 20th day of December, 1917.

(Signed) L. B. Rowe. (Signed) H. H. Hamilton. (L. S.)

Sealed and delivered in the presence of —— ——.

[fol. 65] (Back of Page 1)

STATE OF ——,
—— of ——,
County of ——, ss:

On the — day of ——, in the year one thousand nine hundred and ——, before me personally came —— ——, to me known to be the individual described in and who executed the foregoing instrument and acknowledged that he executed the same."

The witness thereupon further testified as follows:

That he devoted one-third of his time to the affairs of Hamilton & De Loss, Inc., during 1918 and 1919; that he

received no salary from that corporation; that he was also active at that time in the affairs of petitioner and received during that time a salary from petitioner; that he was vice president of petitioner and vice president of Hamilton & De Loss, Inc.; that Hamilton received a salary of about $10,000 a year from Hamilton & De Loss, Inc., but that no other officer or director of Hamilton & De Loss, Inc., received any salary from that company during the year 1918. That John M. Blackburn and Alfred C. Fones were stockholders of Hamilton & De Loss, Inc., but took no active part in the affairs of that company; that they were his close friends and that their stock was voted by him by virtue of proxies given him.

[fol. 66] That during 1917 and 1918, petitioner's business decreased 35% or 40% due to war conditions; that difficulties were experienced in the erection of the plant and installation of machinery for Hamilton & De Loss, Inc., on account of war conditions and that it was some time after the incorporation of Hamilton & De Loss, Inc., that the plant was ready to operate and that the output of the plant had been small up to January, 1918. That at the beginning of the year 1918, the silver business had declined greatly; that the officers were apprehensive that both corporations, they being in the class of non-essential industries, would be commandeered by the government and disorganized. That for these reasons and because of the difficulty in getting proper help and supplies, it was decided by the officers of petitioner and Hamilton & De Loss, Inc., after numerous discussions, not to continue with the silver stamping business for which Hamilton & De Loss, Inc., had been organized and equipped. That it became necessary in order to continue the operation of the plant to secure work from the government, and the corporation then went into production as subcontractors on government work. That the petitioner also secured some subcontracts, which were of benefit in placing it among the essential industries of the country.

That in August, 1918, an officer connected with the gas mask division of the United States Army called on him at the petitioner's Bridgeport plant to ascertain whether that plant could mill brass for making eye pieces for gas masks. That on being informed that it could, the officer inquired

[fol. 67] whether the plant could also stamp out the eye pieces. That he was informed that the work could not be done by the petitioner's plant alone, but that the petitioner also controlled the plant of Hamilton & De Loss, Inc., and that the work could be done in the two plants. That after discussion among the officers and directors of the two corporations, and after he (De Loss) had made several visits to Washington with reference to the matter, it was decided to take the contract for the manufacture of eye pieces in the name of Hamilton & De Loss, Inc., principally because the billing work could be more conveniently handled through the offices of that company than through the New York office of the petitioner. That the petitioner financed the contract, melted the metal, Hamilton & De Loss, Inc., not being equipped for that work, rolled the metal and furnished it to Hamilton & De Loss, Inc., which stamped out the eye pieces and returned the scrap metal to the petitioner for remelting. That the entire contract which called for 1,000,000 eye pieces at 7½¢ each was performed in that manner.

That neither the petitioner nor Hamilton & De Loss, Inc., made any profit from the eye piece contract and that Hamilton & De Loss, Inc., sustained a net loss in the year 1918, and during January, 1919.

That the plant of Hamilton & De Loss, Inc., was not constructed with the idea of engaging in the manufacture of war materials; that petitioner was organized primarily to handle precious metals and was engaged in dealing in such metals and in stamping circles and squares but was [fol. 68] not engaged in stamping shaped material; that it was the intention at the time Hamilton & De Loss, Inc., was organized that the petitioner should continue to mill and roll silver but that Hamilton & De Loss, Inc., should take over the stamping operation and should extend the operation to giving preliminary shape to the pieces and in addition should operate in other metals.

Thereupon testimony was given as follows:

"Q. Mr. De Loss, you made numerous trips to Washington, did you not, prior to April, 1920, in respect to some matters as to which you have testified here today?

A. Yes.

Q. Do you know of your own knowledge whether or not the matters to which the testimony has referred so far today in this hearing was presented to the then commissioner of internal revenue?

A. I don't think I get the nature of your question.

Q. You have been here, have you not, throughout this hearing, Mr. De Loss?

A. Yes.

Q. In respect to the matters about which you have testified, is it or is it not true that prior to April, 1920, those same facts were presented to the then commissioner of internal revenue?

A. Yes.

Q. You yourself personally came down to Washington in connection with such presentation of facts, did you not?

A. Yes.

Q. Do you remember appearing before the Committee on Appeals and Review prior to April, 1920, in connection with this matter and in connection with the presentation of facts about which you have testified?

A. I don't remember about the Committee on Appeals [fol. 69] and Review. I made one or two trips down here, but there were a good deal of other things on my mind at the time.

Q. Well, on the occasion of those trips, were they in connection with this matter of Hamilton & De Loss?

A. Well, on——

Q. And Handy & Harman?

A. On the consolidated return; yes.

Q. And you at that time presented the facts about which you have testified here?

A. Yes."

The foregoing is the substance of all the evidence adduced at the trial of said proceeding, pertaining to assignment of error one to five inclusive.

(Sgd.) Hugh S. Williamson, Attorney for Petitioner.

Approved and ordered to be filed May 14, 1930.

C. M. Trammell, Member Board of Tax Appeals.

Agreed to:

C. M. Charest, General Counsel, Bureau Internal Revenue.

Now, May 21, 1930, the foregoing Statement of Evidence, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

[fol. 70] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Apr. 18, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above stated case, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, duly certified as correct, copies of the following documents and records in the above entitled cause:

(1) Docket entries of the proceedings before the Board.

(2) Pleadings before the Board, including motions filed on behalf of petitioner and copies of the notices of deficiency attached to and made a part of the petitions.

(3) Findings of fact, opinion, decisions and orders of the Board.

(4) Petition for review, together with proof of service of notice of filing such petition, and proof of service of copy of such petition.

[fol. 71] (5) Statement of the evidence as settled and allowed.

(6) This præcipe.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Dated New York, N. Y., April 15, 1930.

Hugh S. Williamson, Attorney for Petitioner.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 19467, 19837

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed Apr. 18, 1930

To C. M. Charest, General Counsel, Bureau of Internal Revenue, attorney for respondent:

[fol. 72] Please take notice that on the 18th day of April, 1930, we filed with the Clerk of the Board of Tax Appeals, a præcipe, designating the portions of the record to be transmitted to the Circuit Court of Appeals for the Second Circuit, on the review taken in the above cause, a copy of which præcipe is hereto annexed and herewith served upon you.

Dated New York, N. Y., April 15, 1930.

Hugh S. Williamson, Attorney for Petitioner.

Service of the foregoing notice and attached copy of præcipe is hereby accepted this 18th day of April, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Now, May 21, 1930, the foregoing Præcipe, with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal.)

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. Nos. 19467 and 19837. C. C. A. No. —

HANDY AND HARMAN, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MOTION FOR ORDER OF SUBSTITUTION

Comes now David Burnet as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Court;

That since the filing of the petition for review in the above-entitled cause, Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That said Robert H. Lucas ceased to be Commissioner of Internal Revenue on August 15, 1930;

That David Burnet was duly ap-ointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas and has duly qualified as said Commissioner of Internal Revenue;

That on August 20, 1930, David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue;

Wherefore, it is accordingly prayed that the above-entitled cause be revived so that this action will be pending against the said David Burnet, as Commissioner of Internal Revenue, and the said David Burnet, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

[fol. 74] It is further shown to the Court that there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained the order of the United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is also shown to this Court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the petitioner in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as the respondent in this cause.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for David Burnet, as Commissioner of Internal Revenue.

Duly sworn to by C. M. Charest. Jurat omitted in printing.

[fol. 75] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

[Title omitted]

ORDER GRANTING MOTION FOR SUBSTITUTION—Filed Nov. 18, 1930

A motion having been made herein by counsel for the Respondent to substitute David Burnet, Commissioner of Internal Revenue, in the place and stead of Robert H. Lucas, Commissioner of Internal Revenue, as respondent herein,

Upon consideration thereof it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 76] [File endorsement omitted.]

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HANDY & HARMAN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Before L. Hand, Swan, and Chase, Circuit Judges

Appeal From the United States Board of Tax Appeals

The taxpayer has petitioned for review of orders of the Board of Tax Appeals in consolidated proceedings relating to income and profits taxes for the years 1918 and 1919. Affirmed.

Breed, Abbott & Morgan, Attorneys for Petitioner; Hugh S. Williamson, Paul L. Peyton, of Counsel.

G. A. Youngquist, Assistant Attorney General, for Respondent; J. Louis Monarch, John H. McEvers, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue; Percy S. Crewe, Special Attorney, Bureau of Internal Revenue, of Counsel.

OPINION

SWAN, Circuit Judge:

Handy & Harman is a New York corporation. Hamilton & De Loss, Inc., is a Connecticut corporation. The issue [fol. 78] presented by this appeal is whether from January 1, 1918, to February 1, 1919, they were affiliated corporations within the meaning of section 240(b) of the Revenue Act of 1918 (40 Stat. 1057). The commissioner ruled against affiliation and denied the use of consolidated returns in determining the petitioner's taxes for the years in question. His action was confirmed by the Board, whose findings of fact and opinion are reported in 17 B. T. A. 980.

Six men owned 93.71 per cent of the stock of Handy & Harman, the remaining shares being owned by employees and most of them being held subject to the corporation's option to repurchase should the shareholder leave its employ. The same six men also owned, in somewhat different proportions, 76.66 per cent. of the stock of Hamilton & De Loss, Inc. An additional twenty per cent. of the stock of this corporation stood in the name of H. H. Hamilton, who was not a stockholder in Handy & Harman. It is the contention of petitioner that Hamilton's stock was owned or controlled by Harry De Loss who was one of the six men owning shares in both corporations. Unless this was so, concededly there was a failure to prove affiliation within the statutory definition requiring "substantially all" of the stock of the two corporations to be "owned or controlled by the same interests." / See Ice Service Co. v. Commissioner, 30 F. (2d) 230 (C. C. A. 2); Commissioner v. Adolph Hirsch & Co., 30 F. (2d) 645 (C. C. A. 2).

The contention that Mr. De Loss did own or control Mr. Hamilton's stock is based upon the facts now to be stated. Hamilton & De Loss was caused to be organized by the officers and majority shareholders of Handy & Harman to take over a department of latter's silversmithing business. Mr. Hamilton, a man of experience in silversmithing, was in- [fol. 79] vited to become president of the new corporation. He was without funds to purchase shares and Mr. De Loss made arrangements with a bank whereby Hamilton borrowed the necessary money upon his notes endorsed by De Loss. Hamilton executed an "irrevocable stock power" assigning his stock in Hamilton & De Loss to Robert M.

Higgins who in turn executed a similar instrument assigning the stock to De Loss, "who deposited it as collateral security for the notes." Hamilton never paid anything upon the notes. In 1919 he became insolvent and on February 1, 1919, De Loss paid the notes and "took over" the stock. Prior to the last mentioned date Hamilton attended all stockholders' meetings of Hamilton & De Loss and always voted his stock in harmony with the men who controlled both corporations Hamilton received a salary from Hamilton & De Loss, but its other directors and officers were also officers or employees of Handy & Harman and received their compensation solely from the latter corporation even though all or a large part of their working hours were devoted to the former. On these facts the Board held that Hamilton's stock was not owned or controlled by De Loss prior to February 1, 1919, and the correctness of that ruling is the issue before us.

It is consistent with the findings and the evidence that the indirect assignment of Hamilton's shares to De Loss was as security for the latter's endorsement of Hamilton's notes. Indeed, we do not understand it to be claimed that the assignment made De Loss the beneficial owner; nor, if such were the claim, do we think the evidence would support it. De Loss testified "that he endorsed the notes given by Hamilton and the stock which was issued to Hamilton was immediately assigned to him and deposited with [fol. 80] the bank as collateral security for the payment of the notes." Why the assignment was made through Higgins does not appear. We regard the transaction as a pledge by Hamilton to De Loss and a repledge by him to the bank. It can hardly be doubted that had Hamilton paid his notes, De Loss' interest in the stock would have terminated. Hence, De Loss did not "own" Hamilton's shares, and the question is narrowed to whether he "controlled" them.

In United States v. Cleveland P. & E. R. Co., 42 F. (2d) 413 (C. C. A. 6) Judge Mack thoroughly reviewed the legislative history of the statute in question and the judicial decisions which have construed it. His opinion demonstrates that the courts are not in accord as to the meaning to be given to the word "control" in determining whether or not affiliation exists. One line of cases holds that when the corporations are operating as a business unit, actual

control of the voting power of the minority stock is sufficient, though based on revocable proxies, relationships of blood or friendship, or perhaps even more acquiescence of the minority. To the authorities cited by Judge Mack as upholding this view may be added the later cases of Kile, & Morgan Co. v. Commissioner, 41 F. (2d) 925 (C. C. A. 1); J. Rogers Flannery & Co. v. Commissioner, 42 F. (2d) 11 (C. C. A. 3); Commissioner v. Richfield Oil Co., 42 F. (2d) 360 (C. C. A. 9); Eby Shoe Co., Inc. v. United States, 44 F. (2d) 273 (Ct. Cl.). If this view be accepted it can scarcely be doubted that Hamilton's stock was "controlled" by De Loss and his associates.

The other line of cases adopts a narrower interpretation, and holds that if "control" means something different from ownership of stock, it must at least be a control legally [fol. 81] enforceable. See authorities cited in United States v. Cleveland P. & E. R. Co., supra. This court is already committed to the narrower view, Commissioner v. Adolph Hirsch & Co., supra; and we are disposed to adhere to it until an authoritative voice declares it wrong. It is impossible to say that De Loss had a legally enforceable control of Hamilton's shares before he paid the note and "took over" the stock. We may assume, without deciding, that a pledgee who is the registered shareholder upon the books of the corporation, "controls" the shares. Cf. Lavenstein Corp. v. Commissioner, 25 F. (2d) 375 (C. C. A. 4). If we go further and assume that a pledgee of the shares who has the power to get them registered in his name "controls" them even before the power is exercised, DeLoss still falls short. See Appeal of Iron City Electric Co., 4 B. T. A. 1178. The Board found that he "deposited" the stock with the bank as collateral security for the notes. We can scarcely believe that this means that he did not transfer to the bank the same title that he himself had received as security for his endorsement; but even if the certificates were merely "deposited", without the execution of an assignment to the bank, his situation is no better. If, as seems probable, the security title was transferred to the bank then it had whatever "control" belongs to a pledgee; if, on the other hypothesis, the certificates were merely deposited without assignment, this too would disable DeLoss from getting the shares registered in his name, for only upon presentation of the old certificates would the cor-

poration issue new ones, and the old ones could not be reclaimed from the bank without payment of the notes. There-
[fols. 82 & 83] fore until the notes were paid DeLoss did not have the rights of a pledgee who is in possession of stock certificates with the power of having them immediately registered in his name, even if it be assumed that the "control" of such a pledgee would be sufficient.

The moral control arising from the pressure which could be put on Hamilton to make him vote with DeLoss and his associates is not, we think, the thing expressed by the statute. There must be the legal power through ownership or control of substantially all the stock to direct the policies of both corporations for affiliation to exist. As to Hamilton's stock that was lacking. Accordingly we think the Board was right, and its orders are affirmed.

[fol. 84] In United States Circuit Court of Appeals,
Second Circuit

Handy & Harman, Petitioner,

v.

Commissioner of Internal Revenue, Respondent

Appeal from the United States Board of Tax Appeals

Judgment—Filed Jan. 12, 1931

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the orders of said United States Board of Tax Appeals be, and hereby are, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 85] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 86] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 16, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,631. U. S. Circuit Court of Appeals, Second Circuit. Term No. 709. Handy and Harman, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed February 5, 1931. File No. 35,631.